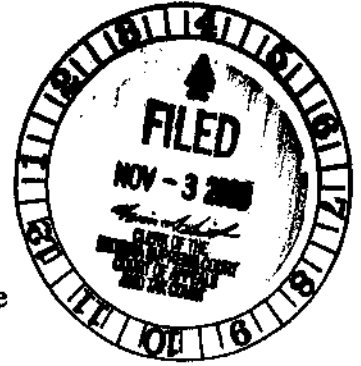


IN THE INDIANA COURT OF APPEALS
CAUSE NO: 18A02-0804-CV-375



JIM MANSFIELD and)
STATE ex rel. MANSFIELD)

Appellants)
(Petitioners/Relators below))

SHARON MCSHURLEY and)
DELAWARE COUNTY, INDIANA)
ELECTION BOARD,)

Appellees,)
(Respondents Below))

Appeal from the Delaware
Circuit Court

Trial Court Cause No:
18C05-0712-MI-150

The Honorable Joel Roberts,
Special Judge

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CROSS-APPELLANT'S REPLY BRIEF

SUMMARY OF ARGUMENT

Mansfield argues that McShurley “continues her pattern of confusing a recount action with a contest/*quo warranto* action.” In doing so, Mansfield seems to suggest that McShurley takes the position that a validly conducted recount precludes the filing of a “contest/*quo warranto*” action *per se*. *Mansfield Response To Cross-Appeal (hereinafter “Response”)* at 20.

McShurley makes no such assertion. Indeed, while McShurley correctly and successfully argued before the Trial Court that Mansfield could not file an untimely statutory contest action, McShurley has been clear that Mansfield was eligible file a *quo warranto* action by virtue of his status as a rival candidate in the election. However, being “eligible” to file a *quo warranto* action by virtue of his status does not, *ipso facto*, eliminate Mansfield’s obligation to allege substantial facts which would, if successfully proven, entitle Mansfield to his requested relief of a special election.

As discussed at length in Appellee/Cross Appellant’s Brief (hereinafter “McShurley’s Brief”), Mansfield has never alleged any set of facts or circumstances which would entitle him to a special election under any Indiana statute or cited case law. On the contrary, Mansfield’s simple and singular allegation that nineteen (19) absentee ballots were disallowed in recount proceedings, combined with Mansfield’s admission that the ballots were *properly* disallowed, render it manifestly impossible for Mansfield to qualify for a special election. Mansfield is not entitled to a special election simply because he was the loser in a properly conducted recount.

From the start (whether by late filing a statutory contest action or by filing the *quo warranto* action with insufficient basis for a special election or by continuing this appeal with no basis whatsoever for a special election), Mansfield's actions have been frivolous, groundless, irrational and in bad faith. As argued in McShurley's Cross Appeal, McShurley is entitled to attorney fees, including appellate fees, for such actions.

ARGUMENT

Mansfield argues that "[w]hether or not the absentee ballots were excluded in the recount proceedings has nothing to do with the allegation in the election contest that 'this mistake made in the distribution of ballots used in the general election of 2007 makes it impossible to determine which candidate received the highest number of votes cast in the election.'" This argument is nothing more than a self-serving and circular conclusion which wholly ignores Mansfield's own repeated admissions that the ballots were properly excluded under Indiana law. As throughout these proceedings, Mansfield simply ignores the "impossible to determine which candidate received the highest number of votes cast in the election" standard as if it does not exist.

As a matter of law and logic, a proper counting under Indiana law of the nineteen (19) absentee votes in question (standing alone as in the instant case) in and of itself defeats any argument that it is "impossible to determine which candidate received the highest number of votes cast in the election." As the Indiana Supreme Court makes clear, the term "votes" means "legal" votes." Any other conclusion leads to absurd results. *Pabey v. Pastrick*, 816 N.E.2d 1138, 1149 (Ind. 2004).

Mansfield not only has not maintained but *cannot* maintain a legally sufficient statutory contest or *quo warranto* action seeking special election without providing any

basis whatsoever for a legal conclusion that it is “impossible to determine which candidate received the highest number of [legal] votes cast in the election.” Mansfield’s continued efforts to do so are frivolous, groundless, irrational and in bad faith.

Mansfield’s continued assertions that he is a “diligent and faultless” contestor (whether in statutory contest or in *quo warranto*) do not and *cannot* satisfy his legal obligation to provide a basis for a special election. *See Mansfield Response at 23*. A mere loser in an admittedly properly conducted recount does not automatically get a special election regardless of how “diligent and faultless” he may or not be.

Mansfield also continues to argue that he has somehow been denied his constitutional rights. *See Mansfield Response at 24*. While Mansfield cites to *McCormick v. Superior Court of Knox County*, 95 N.E.2d 829 (Ind. 1951), he simply ignores the Indiana Supreme Court’s plain rulings:

The requirements of due course of law of § 12 of Article 1 of the Constitution of Indiana, and the provisions for equal protection and due process of law of the Fourteenth Amendment *do not require any particular kind of remedy or identical remedies*. See *Dohary v. Rogers*, 1930, 281 U.S. 362, 50 S. Ct. 299, 74 L.Ed. 904; *Carter v. Illinois*, 1946, 329 U.S. 173, 67 S. Ct. 216, 91 L.Ed. 172.

Id. at 832 (*emphasis added*).

As such, it is well settled that Mansfield may not maintain a late-filed statutory contest action because a *quo warranto* action is available:

It is true that an action for *quo warranto* does not lie until the one holding the latest certificate of election or commission takes possession of the office and assumes the duties thereof. 51 C.J. 318, § 15 and authorities cited; 44 Am.Jur. 105, § 26. This may cause some delay, since it does not permit the institution of an action for such adjudication of title before the official terms of the office begins, *while the statutory contest under the code must be*

filed within fifteen days after the election. But this is a legislative matter which can be remedied by the General Assembly any time it sees fit to amend the Election Code so that the one receiving the first certificate of election could institute an action for a statutory contest after the result of the recount commission is certified.

Id. at 123 (emphasis added).

In the instant case, the availability of a *quo warranto* action negates Mansfield's argument that he is somehow left with no access to the courts. However, the mere theoretic availability of a *quo warranto* action does not automatically entitle Mansfield to a special election in the wholesale absence of any set of facts or circumstances under which a special election may be ordered.

The Court of Appeals has made it abundantly clear that special circumstances surrounding election related matters make the courts *particularly* sensitive to the potential for frivolous litigation:

*We reverse the trial court's judgment denying attorneys' fees to the winning candidates, and we award them appellate attorneys' fees in addition, because there is no reasonable or well-grounded basis for the unsuccessful candidates' claims under the election contest statute. None of the unsuccessful candidates' arguments, even if they had prevailed, would have met the well-established standard for obtaining relief under Indiana Code § 3-12-8-2. **There is no good faith or rational argument supporting the unsuccessful candidates' claim for a special election. Also, the special circumstances of election-related litigation make us particularly sensitive to the potential for frivolous litigation.***

To prevail in their contest action, the unsuccessful candidates were required to show that it was "impossible to determine the candidate who received the highest number of votes" as required by Indiana Code § 3-12-8-2 to order a special election. It has long been the law that "the real subject of the contest is the highest number of legal votes," not "the malconduct of the officers" conducting the election. Dobyns v. Weadon, 50 Ind. 298,

302-03 (1875) (applying earlier version of contest statute). This standard has been applied as recently as last year in Pabey, 816 N.E.2d at 1150 (holding “that the results of an election contested ... may not be set aside and a special election ordered unless the deliberate acts or series of actions succeed in substantially undermining the reliability of the election and the trustworthiness of its outcome”).

Gaddis v. McCullough, 827 N.E.2d 66, 75-76 (Ind. App. 2005)(*emphasis added*).

In the instant case, there are no allegations by Mansfield that the nineteen (19) votes should legally be counted (on the contrary, Mansfield has admitted that the votes were properly excluded); there are no allegations that voters were distributed ballots without Mansfield’s name; there are no allegations that any polling site ran out of ballots; and there are no serious allegations of fraud (Mansfield admitted before the trial court that this was not a fraud case)—all of which could *conceivably* form the legal basis for a request for a special election.

Instead, Mansfield’s sole allegation is that due to the admittedly proper exclusion of certain ballots in the recount, he was declared the loser (after originally being declared the winner on election night). While Mansfield, as a rival candidate, has a *quo warranto* action available, Mansfield has not alleged any circumstances under which a special election could be granted.

By analogy, while there is no question that Indiana citizens have access to the courts to litigate a wrongful death case, a death is generally a prerequisite. Mansfield’s actions in this matter are the functional equivalent of filing a wrongful death case when no death is alleged, amending the pleadings after dismissal *again* without alleging that a death has occurred, and then appealing the second dismissal—all the while admitting that no death occurred.

Mansfield and Quirk's action in this matter fall squarely within each of the concerns identified by the *Gaddis* Court. Mansfield has not identified and *cannot identify* how an admittedly proper and legal exclusion of certain ballots in the recount proceeding makes it "impossible to determine which candidate received the highest number of [legal] votes cast in the election." Rather than "undermining the reliability of the election and the trustworthiness of its outcome," the admittedly properly conducted recount provided the exact opposite—a reliable, trustworthy *and legal* outcome.


In addition to Mansfield's and Quirk's filing of the frivolous, groundless, irrational and bad faith statutory contest action, the subsequent *quo warranto* action, and the filing of this appeal, Mansfield has also acted frivolously, groundlessly, irrationally and in bad faith in other procedural matters throughout this litigation. Such actions include the failure to timely appeal the dismissal of the statutory contest action (after failing to amend the statutory contest action into his amended complaint; and the failure (after twenty (20) days) to respond in any fashion to the motion to dismiss the amended complaint—both matters now on appeal. Mansfield's and Quirk's bad faith is further exhibited by inclusion of "knowingly or intentionally *and fraudulently*" in their allegations of the Quo Warranto Complaint (*M App. at 47, emphasis added*) after previously representing to the Trial Court at the Hearing that "this is not a fraud case." *McS App. at 38.*

Elections must end and become final. Under Mansfield's specious arguments, every loser of a recount who was the original winner would automatically be entitled to a new election without further allegation.

CONCLUSION

These frivolous and irrational actions of Mansfield and Quirk are (given their concessions) purely taken for the purpose of harassing McShurley and have cost McShurley tens of thousands of dollars in order to defend her election as Mayor of Muncie—an election in which Mansfield concedes that the votes were properly counted. Pursuant to IC 34-52-1-1 and Trial Rule 11, Mansfield and Quirk are liable to McShurley for all reasonable attorneys fees incurred in connection with defending these flagrantly frivolous, unreasonable, and groundless actions. *Gaddis v. McCullough*, 827 N.E.2d 66, 75-76 (*Ind. App.* 2005). Thus, the Trial Court erred in declining to award attorney fees to McShurley for the dismissal of both the Contest Petition and the Quo Warranto Complaint. Similarly, pursuant to Appellate Rule 66(E), McShurley should be awarded attorney fees incurred in this appeal.

The “special circumstances of election-related litigation” do and *should* make the courts “particularly sensitive to the potential for frivolous litigation.” *Gaddis at 75-76*. Mansfield and Quirk have admitted that the absentee ballots in question were correctly counted under Indiana law. Accordingly, it is frivolous, groundless, irrational and absurd to also maintain that it is impossible to determine which candidate received the highest number of legal votes. McShurley is entitled to attorney fees incurred for the dismissal of the Contest Petition and the Quo Warranto Complaint, as well as those incurred for this appeal. McShurley respectfully requests that the matter of attorney fees be remanded to the Trial Court for execution of this Court’s ruling.



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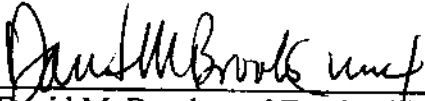
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was forwarded by
United States mail, first class postage prepaid, this 3rd day of October, 2008 to:

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